

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

SAN LUIS COASTAL UNIFIED SCHOOL  
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT,

OAH CASE NO. 2011090132

SAN LUIS COASTAL UNIFIED SCHOOL  
DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH CASE NO. 2012060663

ORDER GRANTING STUDENT'S  
MOTION TO DISMISS

On September 6, 2011, San Luis Coastal District (District) filed a request for due process (complaint) with the Office of Administrative Hearings (OAH). The District asked that OAH find that the assessments of Student it conducted in the spring of 2011 met all legal requirements, so that the District would not be required to pay for an independent educational evaluation (IEE) obtained by Parents. This case was assigned OAH Case No. 2011090132, and shall be referred to as "the IEE case."

On November 22, 2011, Student filed his own complaint. At that time he was represented by Parents. On or about April 5, 2012, Parents retained legal counsel, Attorney Marcy Tiffany. Student asked to file an amended complaint, and OAH granted this request on April 27, 2012. In this complaint Student requested that it be determined that he was eligible for special education services, and that the District be ordered to reimburse Parents for tuition they paid for his placement at a private school, and the cost of an IEE of Student that Parents obtained.

On June 18, the District filed a new complaint with OAH, asking that it be permitted to assess Student without Parents' consent, pursuant to an assessment plan dated May 7, 2012. This complaint was assigned OAH Case No. 2012060663, and shall be referred to as "the assessment case." This case was subsequently consolidated with the other two matters.

On September 20, 2012, Student filed a request to file a second amended complaint. A prehearing conference (PHC) was convened on September 24, 2012, which resulted in a

continuance of the PHC to September 26, 2012. During this PHC, there was discussion about Student's pending motion to again amend his complaint. The undersigned Administrative Law Judge (ALJ) tentatively ruled that she would deny the request to file an amended complaint, but delayed formal ruling to September 26, 2012, to permit counsel for the District to submit a written response to Student's request. This opposition was filed by the District on September 25, 2012.

The formal PHC was held in this consolidated matter on September 26, 2012.<sup>1</sup> Earlier that day Student filed a notice of voluntary dismissal of his complaint. The PHC went forward because the District's two cases were still at issue. The due process hearing in this matter is set to commence on October 10, 2011.

On October 2, 2012, Student filed a motion to dismiss both of the District's complaints. The District filed an opposition on October 3, 2012, Student filed a reply to that opposition on October 4, 2012, and the District then filed a "surreply" to Student's reply.

### APPLICABLE LAW

The purpose of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. § 1400 et. seq.) is to "ensure that all children with disabilities have available to them a free appropriate public education" (FAPE), and to protect the rights of those children and their parents. (20 U.S.C. § 1400(d)(1)(A), (B), and (C); see also Ed. Code, § 56000.) A party has the right to present a complaint "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." (20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a) [party has a right to present a complaint regarding matters involving proposal or refusal to initiate or change the identification, assessment, or educational placement of a child; the provision of a FAPE to a child; the refusal of a parent or guardian to consent to an assessment of a child; or a disagreement between a parent or guardian and the public education agency as to the availability of a program appropriate for a child, including the question of financial responsibility].) The jurisdiction of OAH is limited to these matters. (*Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

Under the doctrine of mootness, a court may refuse to hear a case because it does not present an existing controversy by the time of decision. (*Wilson v. Los Angeles County Civil Service Com.* (1952) 112 Cal.App.2d 450, 453.) However, mootness is not a jurisdictional defect. (*Plymouth v. Superior Court* (1970) 8 Cal.App.3d 454, 460.) A case may be moot when the court cannot provide the parties with effectual relief. (*MHC Operating Ltd. Partnership v. City of San Jose* (2003) 106 Cal.App.4th 201, 214.) An exception to the mootness doctrine is made if a case presents a potentially recurring issue of public importance. (*DiGiorgio Fruit Corp. v. Dept. of Employment* (1961) 56 Cal.2d 54, 58.)

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<sup>1</sup> Several other PHC's had been previously been set in the consolidated matters, but all were continued. September 26, 2012, was the first time a PHC was actually held.

The IDEA provides that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) “Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1), (b)(2).)

When a student requests an IEE, the public agency must, without unnecessary delay, either file a request for due process hearing to show that its assessment is appropriate or ensure that an independent educational assessment is provided at public expense. (34 C.F.R. § 300.502(b)(2); Ed. Code, § 56329, subd. (c).)

If parents do not consent to an assessment or reassessment plan, the District may conduct the assessment by showing at a due process hearing that it needs to assess the student and it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(a)(3)(i), (c)(ii)(2006); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).)

## DISCUSSION

Student asks OAH to dismiss OAH Case No. 2011090132, the IEE case, because he has now withdrawn his request for a District-funded IEE, thereby rendering that case moot. The District opposes the request to dismiss the IEE case claiming that the matter is not truly moot since Student has not withdrawn the request for an IEE with prejudice, so he may still renew the request, once again placing the appropriateness of its assessment at issue. In his reply to the District’s opposition to dismissal of the IEE case, Student cites *Weinstein v. Bradford* (1975) 423 U.S. 147, at page 149 [96 S.Ct. 347], which states the rule to except a case from the mootness doctrine. Student summarizes the two-pronged rule that requires a case to be both “capable of repetition, yet evading review.” As Student points out, should he again request an IEE, the District is not foreclosed from again filing a complaint that asks OAH to find its previous assessment legally compliant. Accordingly, Student’s request to dismiss the IEE case is granted since the case is moot

In regards to the assessment case, OAH Case No. 2012060663, the District claims that there is currently a dispute between Student and the District concerning Student’s attempt to place restrictions on the District’s assessment process, although Parents have now signed the consent for assessment that was at issue in the assessment case. In fact, the consent to assessment form signed by Parents and marked as an exhibit to Student’s motion to dismiss contains no restrictions to the assessment. It appears that the “restrictions” Student is asking for is contained in a letter from Student’s attorney to the District’s attorney that limits observations by District personnel at Student’s current private school to 30

minutes at a time with no more than one person observing, with a maximum time of observation each school day of one hour.

The District correctly states in its opposition that during the PHC on September 26, 2012, this ALJ declared that she was uncertain whether the issue of restrictions imposed on the assessment process was properly encompassed in the District's assessment case, even if Parents signed the assessment plan at issue, and this would be addressed at the beginning of the due process hearing. However, at the time of the PHC, Parents had not yet signed the consent for assessment that is at issue, and no one informed the ALJ what, if any restrictions might be imposed by Student on the assessment process.

In his reply to the District's opposition, Student points out that since he has no complaint currently on file asking that he be found eligible for special education and requesting special education, federal regulations prevent the District from pursuing due process for an order to assess Student without Parents consent because he is currently placed in a private school. (34 C.F.R. § 300.300(c)(4)(i).) Although the District in its surreply concedes that it cannot pursue an action to compel assessment without parental consent in such a case, the District claims that it has no evidence that Parents are not, at this time, pursuing special education eligibility for Student, and reimbursement for his private placement, so therefore 34 C.F.R. section 300.300, subdivision (c)(4)(i) does not apply. However, other than Student's complaint in OAH Case No. 2011110858, which has now been withdrawn, there is no evidence that Parents continue to pursue special education eligibility for Student and reimbursement for his private placement, and 34 C.F.R. does not require an affirmative statement in this regard from parents in order for this regulation to be applied. Accordingly, Student's motion to dismiss the assessment case must be granted. Because the motion to dismiss is granted on these grounds, no further discussion is necessary concerning any restrictions Student has placed on the assessment process.

#### ORDER

Student's motion to dismiss the consolidated cases currently pending a due process hearing, OAH Case Nos. 2011090132 and 2012060663 is granted. The matter is dismissed.

IT IS SO ORDERED.

Dated: October 8, 2012

/s/

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REBECCA FREIE

Administrative Law Judge

Office of Administrative Hearings